EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2018/0003

BETWEEN:

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Appellant

and

WILFRED SMITH

Respondent

Before:

The Hon. Dame Janice Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Godfrey Smith, SC — Justice of Appeal [Ag.]

Appearances:

Mrs. Giselle Jackman-Lumy, with her, Ms. Maya Barry for the Appellant.
Mr. John McCarroll, SC, with him, Mr. Jonathan Addo and Ms. Kisha Frett for the Respondent.

2018: November 2;
2019: January 31.

Civil appeal – Application to strike out claim – Abuse of process – Whether proceeding by way of an ordinary claim for relief in public law amounts to an abuse of process – Whether the master erred in refusing to strike out claim – Statutory process available under Physical Planning Act not pursued – Application for default judgment made after strike out application – Whether respondent entitled to default judgment

The respondent ("Mr. Smith") applied to the Chief Planner of the Planning Authority ("the Authority") of the Virgin Islands for permission to develop land at Slaney, Tortola. On 29th October 2015, the Chief Planner wrote to Mr. Smith indicating deferral of his application and to submit a revised site plan showing an easement to parcel 138. Mr. Smith interpreted that letter as a "stop order" and ceased work on the building, which, according to him, was 50% completed. On 3rd February 2016, the Authority informed Mr. Smith that the condition regarding the easement and/or access to parcel 138 had been removed. It

also listed five conditions with which Mr. Smith was required to comply. Approval of the application was expressed to be "only valid when the above conditions have been met".

On 20th June 2016, Mr. Smith filed a claim in negligence and breach of statutory duty against the Chief Planner and the Authority alleging that no reason was given for the issuance or the eventual lifting of the "stop order" and that his investors had withdrawn from the project once the "stop order" had been issued. Mr. Smith filed an amended and then a second amended claim in which the Chief Planner and the Authority were replaced by the Attorney General. In the second amended statement of claim, he alleged that the Authority was negligent in its handling of his application for planning approval and in breach of its statutory duty under section 29 of the Physical Planning Act ("the Act").

On 12th July 2016, the Attorney General applied to strike out the statement of claim on the grounds that it was an abuse of process; that section 66 of the Act provided an avenue to challenge the decision of the Authority by way of an appeal to the Appeals Tribunal; that the time within which to appeal had expired; and that the nature of the complaints would have been more amenable to judicial review. The Attorney General also sought an extension of time for the filing of a defence to the claim. The master refused to strike out the claim, granted the extension of time and directed that the matter be case managed.

On 22nd May 2017, the Attorney General sought leave to appeal the master's decision and a stay of proceedings pending the hearing of the appeal. Later that day, Mr. Smith applied for default judgment which was never entered by the court office. The applications for leave to appeal and a stay of proceedings were heard on 23rd April 2018 and were both granted.

The main question for the Court's determination on the appeal was whether the master erred in not striking out the claim as an abuse of process. At the hearing, the Court was also invited to determine whether Mr. Smith is entitled to default judgment for failure of the appellant to file a defence.

Held: allowing the appeal; striking out the second amended claim and statement of claim and awarding costs to the appellant to be assessed by the master or the registrar, if not agreed, within 21 days of this order, that:

1. The mere characterisation of a claim as one in public law is not sufficient to preclude it from being adjudicated upon as a private claim. Each case must be carefully examined on its own facts. To do otherwise would be to place procedural barriers in the way of an individual's right to freely access the court for vindication of his rights.

   O'Reilly v Mackman [1983] 2 AC 237 applied.

2. Mr. Smith has characterised the letter of 29th October 2015 as a "stop order" when it appears to have been a condition imposed under the Act. The statutory duty that has been allegedly breached is the issuance of the "stop order" contrary to the Act. Mr. Smith also alleges the negligent mishandling of the application which is also predicated on the letter of 29th October 2015. On any view, the "stop order"

was the singular event that triggered the claim. There is no separate or subsisting private law right. This makes the claim a public law claim.

Davy v Spelthorne Borough Council [1983] 3 All ER 278 distinguished.

3. The Act sets out the procedure under which the Authority may consider applications, impose conditions where necessary and determine applications. There is a procedure for appealing decisions of the Authority. Further, under section 44(8) of the Act, Mr. Smith was entitled to appeal against the "stop order" directly to the Court. The Court could quash a stop order as well as award compensation. The Act therefore provided adequate and appropriate protection to Mr. Smith for the alleged, unlawful stop order and an avenue to challenge the decision to impose a condition. Rather than availing himself of that statutory process, he allowed eight months to pass before filing a private law claim in negligence in the High Court. In the circumstances, this amounted to an abuse of process.

4. The effect of filing an application to strike out a claim as an abuse of the court's process, earlier in time to a request for default judgment, is to oblige the court office to refuse to enter default judgment.

   St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited St. Christopher and Nevis, Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) applied.

JUDGMENT

[1] SMITH JA [AG.]: This is an appeal against the decision of the learned master refusing the appellant's application to strike out the respondent's second amended statement of claim. The appellant's application was made on the ground that it was an abuse of the process of the court as the claim had been brought as a private law claim when the respondent ("Mr. Smith") ought properly to have used the statutory process available under the Physical Planning Act 2004[1] ("the Act") or seek judicial review to resolve his grievance. Mr. Smith's contention is that his claim is a private law claim and he ought not to be corralled into seeking public law remedies where none are desired.

[1] Act No. 15 of 2004, Laws of the Virgin Islands.

Background

[2] In June 2013, Mr. Smith applied to the Chief Planner of the Panning Authority ("the Authority") of the Virgin Islands ("the BVI") for permission to develop land at Slaney, Tortola. He intended to build a restaurant and sports bar which he hoped to finance with the help of investors. In September 2013, his application was approved, and he commenced construction but suspended the work in August 2014. His decision to add a second storey to the building triggered another round of exchanges with the Authority, but these need not concern us for the purposes of this appeal.

[3] On 29th October 2015, the Chief Planner wrote to Mr. Smith as follows:

> "Dear Sir,
>
> I refer to application D23/13 (Amendments received on 27th October 2015), Bar & Restaurant, submitted on your behalf by Sirron Scatliffe, at Slaney, Road Town, on Sheet and Parcel number 2936B – 188.
>
> On 29 October 2015, the Planning Authority deferred the application for the following reasons:
>
> - Access through the Old Public Road to Parcel 138 must be maintained. Accordingly, the Agent/Applicant needs to submit a revised Site Plan indicating an Easement to the said Parcel.
>
> The amendments should be provided within twenty-eight (28) days of this letter, if the application is to progress further."

[4] Mr. Smith interpreted that letter as a "stop order" and ceased to carry on construction works on the building which, according to him, was 50% completed. He alleged that he and his investors had been planning to open for business in mid-December 2015.

[5] On 3rd February 2016, the Authority wrote to Mr. Smith informing him that "after further consideration, the condition regarding easement and/or access through the old public road to parcel 138 has been removed". It also listed five conditions with which Mr. Smith was required to comply. Approval of the application was expressed to be "only valid when the above conditions have been met".

[6] On 20th June 2016, Mr. Smith filed a claim in negligence and breach of statutory duty against the Chief Planner and the Authority seeking damages of $1,100,671.01. After the Attorney General applied to strike out the claim, a second amended claim and statement of claim were filed on 9th February 2017 in which the Chief Planner and the Authority were replaced by the Attorney General as the defendant to the claim. Mr. Smith alleged that no reason was given for the issuance or the eventual lifting of the "stop order" and that his investors had withdrawn from the project once the "stop order" had been issued. This, he alleged, caused him to lose their investment as well as projected income presented by the 2015/2016 tourism season.

[7] The second amended statement of claim alleged that the Authority was negligent in its handling of his application for planning approval and in breach of its statutory duty under section 29 of the Act. His pleaded particulars of negligence and breach of statutory duty were as follows:

> "1. The failure to determine the Claimant's application in accordance with section 29 of the Act or within a reasonable time.
>
> 2. The failure to issue a Compliance Notice which is required within the terms of the Act.
>
> 3. The issue of the Stop Order without reason legal an otherwise (sic) and maintaining it in effect without reason for a period of 5 months especially during the tourist season.
>
> 4. In consequence the Claimant was prevented from the completion of the construction of the building by mid December for the start of the Tourist season and the Claimant was thereby deprived of the benefit of an important business opportunity and the benefit of projected income from his business of a Sports Bar and Restaurant."

[8] He also alleged that the "stop order" was issued wholly in breach of the law; there was no evidence of any breach of a compliance notice; and therefore there could be no validly issued "stop order". The "stop order", he alleged, was in contravention of the Act in the following particulars:

1. It did not have annexed to it a copy of the compliance notice, the breaches of which were being alleged, as required by the Act.

2. It made no mention of the alleged breaches of planning control as required by the Act.

3. None of the activities which may be the subject of a stop order as set out in the Act was being carried on by the Claimant, nor was it alleged that the claimant was carrying on any of those activities on the property.

[9] On 12th July 2016, the Attorney General applied to strike out the statement of claim, relying, firstly, on the ground that it was an abuse of process. Secondly, that section 66 of the Act provided that any applicant dissatisfied with a decision of the Authority may appeal to the Appeals Tribunal. Thirdly, that the time within which an appeal could be launched had expired. Fourthly, that the nature of the complaints would have been more amenable to judicial review. The Attorney General also sought an extension of time for the filing of a defence to the claim.

[10] The strike out application was heard on 17th March 2017 and, on 10th April 2017, Master Actie ruled that:

"5. The claimant avers that he is not dissatisfied with the decision of the Authority as permission was granted to develop as he requested in his application. The claimant is bringing a private law action seeking damages in a claim in negligence. The court notes that the claimant's cause of action does not fall within the ambit of the provisions of Section 66 of the Act as contended by the defendant. The decision of the Authority was in contemplation of the claimant's application. According, the application fails on this ground.

…

11. I am of the view that the claimant has particularized a claim in private law against the defendant. The claimant should be given an opportunity to ventilate his claim. The court is duty bound under the overriding objectives to allow mattes with a reasonable cause of action to proceed to trial instead of utilizing this draconian option of striking out at this stage of the pleadings.

> Accordingly, the defendant's application to strike out the claimant's claim is hereby refused."

[11] The learned master granted the Attorney General an extension of 21 days from the date of her ruling to file a defence and directed that the matter be listed for case management conference on the 18th May 2017.

[12] The Attorney General prepared a notice of application for leave to appeal (amended on 19th May 2017 and filed on 22nd May 2017), for a stay of the proceedings pending the determination of the appeal and, alternatively, for an order that the time for the filing of his defence be extended.

[13] In the meantime, the case management conference that Master Actie had directed be held, occurred on 19th May 2017 before Master Glasgow. Both the Attorney General and Mr. Smith were represented by counsel. Master Glasgow's order was as follows:

> "UPON the matter coming up for Case Management Conference. On the previous hearing of the Claim, the Court granted the Defendant permission to file a Defence within 21 days and adjourned the matter to today for Case Management. The Defendant did not file a Defence but has applied to the Court of Appeal for Leave to Appeal the Court's previous Order and for a Stay of Proceedings. There is no application before the Court for further extension of time to file a Defence and application to this Court for a stay. The matter will be removed from the Case Management. Counsel for the Claimant informs the Court that he is to take the necessary steps for the grant of a Default Judgment.
>
> IT IS HEREBY ORDERED THAT:
>
> 1. The matter is removed from the Case Management list."

[14] On 22nd May 2017, the Attorney General filed his amended notice of application for leave to appeal and for a stay of the proceedings at 10:35 a.m. Later that day, Mr. Smith applied for default judgment. The court office never entered the default judgment. The next step in these proceedings did not occur until almost a year later. This might have had something to do with the fact that, on 6th September

2017, the BVI was severely impacted by the passage of a category 5 hurricane damaging the court office and much of its records.

[15] The Attorney General's application for leave to appeal was not heard until 23rd April 2018 at which time Ellis J granted leave to appeal against the ruling of Master Actie and ordered a stay of the proceedings pending the determination of the appeal. By that time, as mentioned above, Mr. Smith had already applied for default judgment.

Grounds of Appeal

[16] The Attorney General's notice of appeal listed seven grounds of appeal grounds which Mrs. Jackson-Lumy has helpfully distilled to three categories: abuse of process (grounds a, b, and e); the stop order (grounds c and d) and the ouster clause (ground f). She abandoned ground (g), that the claim was statute-barred.

[17] The outcome of the appeal therefore appeared to hinge on whether, on its facts, it was caught by the principle in **O'Reilly v Mackman**,[2] that proceeding by way of an ordinary action for relief available under public law would be an abuse of process, or whether it could be excepted from that principle. The appeal, however, took an unexpected turn when Mr. McCarroll, SC, in the course of his submissions that the claim was not an abuse of process, informed the Court that Mr. Smith was entitled to default judgment against the Attorney General. Neither the Court nor the Attorney General had been forewarned that any such point would have been taken.

Issues

[18] The issues that arise for determination are:

(1) Whether the respondent is entitled to default judgment;

(2) Whether the learned master erred in not striking out the claim as an abuse of process; and

[2] [1983] 2 AC 237, 285.

(3) Whether the learned master erred in not striking out the claim on the ground that the Act ousts or prohibits the payment of any compensation to the respondent.

Is the Respondent entitled to Default Judgment?

[19] Mr. McCarroll contended that, at the time Mr. Smith applied for default judgment, no defence had been filed and no stay of proceedings ordered. The application for default judgment, he submitted, had no procedural flaws and, consequently, he was entitled to default judgment, notwithstanding the failure of the court office to have entered it. Mrs. Jackman-Lumy protested that the point ought to have been raised at the case management conference held on 4th October 2018 or at the start of the appeal. She pointed out that the Attorney General had filed his amended notice of application for leave to appeal and for stay pending appeal before Mr. Smith filed his application for default judgment.

[20] A useful starting point is the consideration of the rules governing default judgments for failure to defend a claim which are set out at Part 12 of the Civil Procedure Rules 2000 ("CPR"):

> "12.5 Conditions to be satisfied – judgment for failure to defend
>
> The court office at the request of the claimant must enter judgment for failure to defend if –
>
> (a)
> (i) the claimant proves service of the claim form and statement of claim; or
>
> (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;
>
> (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
>
> (c) the defendant has not –
> (i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6);
>
> ….."

[21] It is not in dispute that Mr. Smith served the second amended claim and statement of claim on the Attorney General; that the period for the filing of a defence and the extension ordered by the court had expired; that the parties had not agreed to any extension of time for the filing of a defence; and that the Attorney General had not filed a defence to the respondent's claim. We are, however, for the following reasons, disinclined to order that default judgment should be entered for Mr. Smith. Firstly, the point was not taken in the respondent's skeleton arguments and was quite literally sprung upon the Court in an impromptu manner. Secondly, the documents relevant to this point were not included in the record of appeal, nor was there any application to have them included. Thirdly, in St. Kitts Nevis Anguilla National Bank Limited and Caribbean 6/49 Limited,[3] this Court held that the overriding objective of the CPR, to enable the court to deal with cases justly, dictates that the effect of filing an application to strike out a claim as an abuse of the court's process, earlier in time to a request for default judgment, is to oblige the court office to refuse to enter default judgment. In the instant case, the Attorney General had similarly applied to strike out the entire claim as being an abuse of the court's process and, following the learned master's refusal to do so, had subsequently applied for leave to appeal and a stay of proceedings earlier in time to Mr. Smith's request for entry of default judgment. The court office did not enter default judgment and, in these circumstances, we are of the view that no order for the entry of default judgment should be made. We now go on to consider the second issue.

Abuse of Process

[22] The Attorney General's case may be succinctly summarised as follows: (1) Mr. Smith's underlying grievance is the letter of 29th October 2015 which he mischaracterises as a "stop order" issued by the Authority; (2) the "stop order" was in fact not a stop order but a condition imposed by the Authority, under section 31 of the Act, to be satisfied by Mr. Smith before he could proceed with his development project; (3) ultimately, it does not matter whether it was a stop order

[3] St. Christopher and Nevis, Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported).

or a condition because, either way, the Act provides an appropriate appeal process for an applicant aggrieved by the issuance of a stop order or the imposition of a condition; (4) Mr. Smith was therefore obliged, under the **O'Reilly v** Mackman principle to seek redress under the statutory appeal process; and (5) having failed to have done so and the time-limit for appealing having expired, Mr. Smith has sought, "to dress up" what is, by its nature, a public law claim as a private law claim.

[23] Mrs. Jackman-Lumy directed the Court's attention to oft-cited statement from Lord Diplock in **O'Reilly v Mackman**:

> "Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties' object to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis-a process that your Lordships will be continuing in the next case in which judgment is to be delivered today." (underlining supplied)

[24] From the above passage, it seems clear that Lord Diplock considered himself to be stating a general rule subject to exceptions. Indeed, over time, courts have found exceptions to the principle. We therefore do not approach this appeal with the view that the mere characterisation of a claim as one in public law is sufficient to preclude it from being adjudicated upon as a private claim. Each case must be carefully examined on its own particular facts. To do otherwise would be to place

procedural barriers in the way of an individual's right to freely access the court for vindication of his rights.

[25] From a careful examination of Mr. Smith's pleadings, set out at paragraphs 7 and 8 of this judgment, it is difficult to avoid the conclusion that his case is predicated upon the letter of 29th October 2017 which he characterises as a "stop order" and which, he alleges, was unlawfully issued. For the purpose of analysing his argument, we will consider the letter as a "stop order". Prior to the "stop order" being issued, things appeared to have been going well. Mr. McCarroll submitted that Mr. Smith did not wish to appeal or quash the decision of the Authority. He was aggrieved by "the process as a whole" which was negligently mishandled and occasioned the loss claimed.

[26] Even on Mr. McCarroll's characterisation of the claim, however, it is the inescapable fact that the "stop order" lies at the heart of the alleged mishandling of the application. According to Mr. Smith, once the "stop order" was issued, his development ground to a halt, his investors deserted him, and he suffered economic loss. The "stop order" was the singular event that triggered the claim. What is being impugned is the decision of a public body, the Authority, to issue the "stop order". There is no separate or subsisting private law right. This is what makes it a public law claim. The statutory duty that has been allegedly breached is the issuance of the "stop order" contrary to the Act. What must now be determined is whether the Act affords an appropriate remedy for any unlawful issuance of a stop order.

[27] Section 29 of the Act sets out how applications are to be determined:

> "29. (1) The Authority may
>
> (a) grant development permission unconditionally;
>
> (b) grant development permission subject to such conditions as it thinks fit; or (underlining supplied)

(c) refuse development permission.

(2) Within sixty days of receipt of an application for development permission the Chief Planner shall notify the applicant in writing, of the determination of the application, providing in the case of paragraph (b) or (c) of subsection (1)

(a) a statement of the reasons for the determination;

(b) information on the applicant's right of appeal under Part VIII.

(3) Where no decision has been made within sixty days of receipt of the application the Chief Planner shall notify the applicant of the progress made on the application and the extended date by which the decision is likely to be made.

(4) The extended date referred to in subsection (3) shall not be longer than a period of thirty days from the expiration of the sixty-day period referred to in that subsection.

(5) Where no decision has been made by the extended date referred to in subsection (3), the application shall be referred to the Minister and shall be treated in the same manner as an application referred to the Minister under section 38."

[28] Section 31 deals with conditions of development permission that may be imposed by the Authority:

"31. (1) Without prejudice to the generality of section 29 (1) (b), the Authority may impose conditions on a grant of development permission which relate to any matter referred to in section 28… (underlining supplied)

(5) No claim to compensation or damages shall lie against the Government, the Minister, the Authority, the Chief Planner or other public officer in respect of, or arising out of or in connection with, any refusal of permission for development…

(6) No claim to compensation or damages shall lie against the Government, the Minister, the Authority, the Chief Planner or any other public officer in connection with or arising out of the grant by the Authority of development permission subject to conditions.

[29] Section 44 deals with stop orders but, for the purposes of this appeal, it is only necessary to set out the provisions dealing with appeals against stop orders:

> "44. (8) It is declared that
>
> …
>
> (d) a person on whom a stop order is served may appeal to the Court against the making of the stop order within twenty-eight days of service of the order and the Court may confirm the stop order with or without modification, or quash it in whole or in part;
>
> …
>
> (f) no compensation shall be payable in respect of the prohibition in a stop order of any activity which at any time when the order is in force, constitutes, or contributes to, a breach of planning control."

[30] Section 66 deals with the right of appeal:

> "66. (1) Any applicant who is dissatisfied with a decision of the Authority set out in subsection (2), … may appeal to the Appeals Tribunal against that decision in the manner prescribed in this Part.
>
> (2) An appeal shall lie to the Appeals Tribunal against any decision made by the Authority under this Act
>
> …
>
> (b) imposing conditions on a grant of development permission;
>
> …
>
> (3) Subject to any provision to the contrary in this Act, any person wishing to appeal under subsection (2) shall,
>
> (a) within forty-two days of the decision which is to be appealed against under subsection (2) (a), (b), (c) or (e)…"

[31] Finally, section 72 deals with appeals to the High Court

> "72. (1) Subject to the provisions of this Act, no appeal shall lie against a decision of the Authority in a matter to which section 66 relates otherwise than as provided for by sections 66 to 71 nor shall any such decision or order be reviewable in any manner by any court.
>
> …
>
> (3) An appeal shall lie to the Court from a decision of the Appeals Tribunal on a point of law but not on any matter of fact and not in any manner upon the merits of the policies applied by the Authority or the Appeals Tribunal in reaching the relevant decision."

[32] It seems, from the above, that the Act sets out clear procedures under which the Authority may consider applications, impose conditions where necessary and determine applications. There is a procedure for appealing decisions of the Authority. We are not of the view that the letter of 29th October 2015 was a stop order. It appears to have been a condition imposed either under section 29 or 31 of the Act. However, if on Mr. Smith's argument, the letter was a stop order and not a condition, then under section 44(8) of the Act he was entitled to appeal against that decision directly to the Court. The Court could quash a stop order as well as award compensation, provided that the stop order was not in respect of any activity which breached planning control. Since Mr. Smith's contention was that he was not in breach of any planning control, if he prevailed in court, he could have claimed compensation. The Act therefore provided adequate and appropriate protection to Mr. Smith for the alleged, unlawful stop order. Instead of availing himself of that statutory process, he allowed eight months to pass before filing a private law claim in negligence in the High Court.

[33] Mr. McCarroll relied on the House of Lords judgments of Davy v Spelthorne Borough Council[4] and Roy v Kensington and Chelsea and Westminster Family Practitioners Committee[5] which, he submitted, made it "perfectly permissible" for Mr. Smith to have brought the claim as a private law claim. He

[4] [1983] 3 All ER 278.
[5] [1992] 1 AC 624.

drew the Court's attention to the following passages from the speech of Lord Fraser in Davy v Spelthorne:

> "This appeal is a sequel to the decision of this House in the case of *O'Reilly v. Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237. The issue of most general importance raised in the appeal relates to the circumstances in which a person with a cause of action against a public authority, which is connected with the performance of its public duty, is entitled to proceed against the authority by way of an ordinary action, as distinct from an application for judicial review.
> …
>
> But in my opinion, the respondent's claim for damages is not barred by s 243(1)*(a)*. That paragraph provides that the validity of an enforcement notice shall not be questioned in any proceedings whatsoever 'on any of the grounds on which such an appeal may be brought.' The words 'such an appeal' are a reference back to an appeal under Part V of the 1971 Act, and they mean in effect the grounds specified in s 88(2). But s 243(1) *(a)* does not prohibit questioning the validity of the notice on other grounds. If, for example, the respondent had alleged that the enforcement notice had been vitiated by fraud, because one of the appellants' officers had been bribed to issue it, or had been served without the appellants' authority, he would indeed have been questioning its validity, but not on any of the grounds on which an appeal may be brought under Part V. So here, the respondent's complaint that he acquiesced in the enforcement notice because of negligent advice from the appellants is not one of the grounds specified in s 88(2), and it would not have entitled him to appeal to the Secretary of State under Part V of the 1971 Act. Accordingly, even on the assumption that the validity of the enforcement notice is being questioned in the present proceedings (an assumption which in my opinion is open to serious doubt), it is certainly not being questioned on any of the grounds referred to in s 243(1)*(a)* and the proceedings are not barred by that subsection. In my opinion, therefore, the appellants' first contention fails."

[34] Mr. McCarroll submitted that, just as in Davy where reliance on negligent advice was not one of the grounds upon which an appeal could have been based, in the instant case, negligent mishandling of an application was not one of the grounds on which Mr. Smith could have appealed under the Act. He had no other recourse but his private law claim. We do not agree. The alleged negligent mishandling of the application is predicated on the letter of 29th October 2015 which could have been appealed against directly to the court. We are therefore of the view that,

notwithstanding its characterisation as a claim in negligence, it is fundamentally a claim in public law.

[35] Mr. McCarroll also relied on the following passage in Davy:

> "The appellants accept that there are, of course, many claims against public authorities which involve asserting rights purely of private law, and which can be pursued in an ordinary action. They accept also that, if a question as to the validity of the enforcement notice had arisen incidentally in an action to which they, the appellants, were not parties, it could properly have been decided in the High Court, for example, if it had arisen as a preliminary issue in an action by the respondent against his solicitors for negligence. But counsel for the appellants maintained that, when there is an issue between a citizen and a public authority which involves determining whether the citizen can challenge a public notice or order, the only way to decide the issue is by way of procedure under Ord 53. He maintained further that it makes no difference whether the issue concerns a present right or a past right to challenge the notice or order. The only relevant distinction, he said, between a past right and a present right is that investigating a past right tends to be more difficult, and more burdensome to the public authority, than investigating a present right, so that the authority's need for the protection of Ord 53 will be all the greater in the former case.
>
> Although the argument was presented most persuasively, it is in my view not well founded. The present proceedings, so far as they consist of a claim for damages for negligence, appear to me to be simply an ordinary action for tort. They do not raise any issue of public law as a live issue. I cannot improve upon the words of Fox L.J., in the Court of Appeal, when he said:
>
> > '… I do not think that the negligence claim is concerned with "the infringement of rights to which [the plaintiff] was entitled to protection under public law" to use Lord Diplock's words in *O'Reilly v. Mackman*. The claim, in my opinion, is concerned with the alleged infringement of the plaintiff's rights at common law. Those rights are not even peripheral to a public law claim. They are the essence of the entire claim (so far as negligence is "concerned).'
>
> It follows that in my opinion they do not fall within the scope of the general rule laid down in *O'Reilly*.
> …
> In the present case, on the other hand, the respondent does not impugn or wish to overturn the enforcement order. His whole case on negligence depends on the fact that he has lost his chance to impugn it. In my opinion therefore the general rule stated in *O'Reilly* is inapplicable."

[36] The facts of Davy are distinguishable from Mr. Smith's circumstances. In Davy, relying on the negligent advice of the Borough Council, the applicant lost his opportunity to challenge an enforcement notice that had been issued to him. The act of giving the advice was separate and distinct from the issuance of the enforcement notice. The applicant therefore sued the council in negligence. The question of whether the council gave negligent advice raised no live, public law issue. It was a claim based entirely in negligence. In Mr. Smith's case, his entire claim was based on the Authority's imposition of a condition on his building project which he could have appealed under the Act. He chose not to have availed himself of the statutory protection. It is that same decision of the Authority to have imposed a condition that he now seeks to characterise as a negligent mishandling of his application. There is therefore no genuinely separate, free-standing claim in negligence as there was in Davy. As is clear from the speech of Lord Wilberforce in Davy, the principle in **O' Reilly v Mackman** did not apply because there was an independent and separate action in negligence:

> "The second point is the substantial one. For proper appreciation it is necessary to define the claim to which it relates. As pleaded (and for the purpose of this appeal we are only concerned with the pleading and not with its substance or merits) it is that the appellants owed to the respondent plaintiff a duty of care in, through its officers, advising him as to his planning application; that the council was negligent in so advising him; that by reason of this negligence he suffered damage, namely the loss of a chance of successfully appealing against the enforcement notice served upon him by the appellants. Though this was initially one of several claims, it now stands on its own, and should be judged as an independent and separate action."

[37] Mr. McCarroll placed great emphasis on the following passage from the speech by Lord Bridge in Roy v Kensington which he submitted supported his contention that Mr. Smith was entitled to bring a claim in negligence to support his private law rights:

> "The decisions of this House in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v Thanet District Council* [1983] 2 A.C. 286, have been the subject of much academic criticism. Although I appreciate the cogency of some of the arguments advanced in support of that criticism, I have not been persuaded that the essential principle embodied in the decisions requires to be significantly modified, let alone overturned. But if it is

important, as I believe, to maintain the principle, it is certainly no less important that its application should be confined within proper limits. It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him. I think this proposition necessarily follows from the decisions of this House in *Davy v. Spelthorne Borough Council* [1984] A.C. 262 and *Wandsworth London Borough Council v. Winder* [1985] A.C. 461. In the latter case Robert Goff L.J. in the Court of Appeal, commenting on a passage from the speech of Lord Fraser of Tullybelton in the former case, said, at p. 480:

> 'I read this passage in Lord Fraser of Tullybelton's speech as expressing the opinion that the principle in *O'Riley v. Mackman* should not be extended to require a litigant to proceed by way of judicial review in circumstances where his claim for damages for negligence might in consequence be adversely affected. I can for my part see no reason why the same consideration should not apply in respect of any private law right which a litigant seeks to invoke, whether by way of action or by way of defence. For my part, I find it difficult to conceive of a case where a citizen's invocation of the ordinary procedure of the courts in order to enforce his private law rights, or his reliance on his private law rights by way of defence in an action brought against him, could, as such, amount to an abuse of the process of the court.'"

[38] The House of Lords concluded that the facts of Roy v Kensington removed it from the ambit of the rule in **O'Reilly v Mackman** for a number of reasons identified by Lord Lowry at page 654 of that judgment:

> "(1) Dr. Roy has either a contractual or a statutory private law right to his remuneration in accordance with his statutory terms of service.
>
> (2) Although he seeks to enforce performance of a public law duty, ... his private law rights dominate the proceedings.
>
> (3) The type of claim and other claims for remuneration (although not this particular claim) may involve disputed issues of fact.
>
> (4) The order sought (for the payment of money due) could not be granted on judicial review.

(5) The claim is joined with another claim which is fit to be brought in an action (and has already been successfully prosecuted).

(6) When individual rights are claimed, there should not be need for leave or a special time limit, nor should the relief be discretionary.

(7) The action should be allowed to proceed unless it is plainly an abuse of process."

[39] In the case at bar, Mr. Smith had no separate, subsisting private law right that dominated the proceedings. No individual rights were claimed. He had applied to a public body for approval for a development project and was dissatisfied with a condition that body imposed. Rather than challenging that decision directly to the Court if he believed it to be a stop order, he allowed the statutory time limit to expire. As previously stated, he was not precluded from seeking compensation from the Court under section 44(8)(f) of the Act if he was successful in challenging the "stop order". Taking these factors into consideration, this, in our opinion, amounted to an abuse of process.

[40] This finding that there was an abuse of process is dispositive of the appeal and makes it unnecessary to consider the remaining grounds of appeal.

Conclusion

[41] The appeal is therefore allowed. The second amended claim and statement of claim are struck out. The appellant is entitled to his costs to be assessed by the master or the registrar, if not agreed, within 21 days of this order.

I concur.
Dame Janice M. Pereira
Chief Justice

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar